

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	
	)	Appeal No. 98-0001
THOMAS W. MITTENEN,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
LEROY G. COSSETTE,	)	March 22, 2000
Respondent	)	
_____	)	

STATEMENT OF THE CASE

The Respondent, Mr. LeRoy Cossette, and the Appellant, Mr. Thomas Mittenen, filed separate, conflicting applications for halibut Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program, based on halibut landings made from the F/V ESKIMO PRINCESS in 1986. The Restricted Access Management program [RAM]<sup>1</sup> approved Mr. Cossette's application based on his ownership of the vessel. RAM denied Mr. Mittenen's application in an Initial Administrative Determination [IAD] issued December 14, 1995. Mr. Mittenen had claimed that he held an oral lease of the vessel from Mr. Cossette between April and October 1986,<sup>2</sup> but RAM determined that Mr. Mittenen did not submit sufficient evidence of a lease during the time allowed. Mr. Mittenen filed a timely appeal of the IAD on February 9, 1996.<sup>3</sup> Almost two years later, Mr. Mittenen retained an attorney to represent him and submitted several pieces of evidence indicating the existence of a vessel lease, which caused us to join Mr. Cossette as a party to the appeal and to request that RAM suspend his use of the halibut QS pending the outcome of the appeal. [Notice and Order, February 4, 1998]

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<sup>1</sup>The Restricted Access Management Division was renamed Restricted Access Management program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

<sup>2</sup>On his Request for Application form, Mr. Mittenen wrote that he had leased the F/V ESKIMO PRINCESS from April to October 1966. He subsequently testified, without objection, that this was an error and that he meant to write 1986. This date is consistent with other evidence in the record and I accepted 1986 as the correct year of the claimed vessel lease.

<sup>3</sup>This appeal was originally filed as part of Appeal No. 96-0002. This Office subsequently bifurcated this portion of the appeal and filed it separately as Appeal No. 98-0001. The original appeal also involved another vessel in which Mr. Cossette has no interest.

I admitted a substantial number of documents submitted by both parties during the remainder of 1998 and early 1999, and I entertained several motions by both sides. An oral hearing was held on March 17-18, 1999, in Seattle, Washington to determine whether Mr. Mittenen had leased the F/V ESKIMO PRINCESS from Mr. Cossette in 1986. The parties and their attorneys were present at the hearing. Mr. John Wilcomb, formally of Ursin Seafoods, Inc., testified in person at the hearing. Another witness, Mr. John Long, of Griffin MacLean, Inc., testified telephonically. Mr. Bernard Gallaher was unavailable for testimony. Mr. Mittenen and Mr. Cossette testified in person. Mr. Steve Hinckle of this Office taped the testimony at the hearing.

Two days before the hearing, Mr. Cossette informed this Office that he had discovered relevant documents that had not been produced for the record. The documents were produced one day before the hearing in Seattle, Washington, by Mr. Cossette's attorney. The documents consisted of Mr. Cossette's federal tax return for 1986; bank checks, deposit slips, and deposit statements relating to Mr. Cossette's account in 1986 for the F/V ESKIMO PRINCESS at The First National Bank of Anchorage, Kodiak; and invoices, signed either by Mr. Cossette or by Mr. Mittenen, for purchases of engine parts, supplies, fishing gear on the account of Mr. Cossette and the F/V ESKIMO PRINCESS at various businesses in 1986. Because of the untimely production of the documents, I ordered that the documents could not be used during the oral hearing. Upon later review, I determined that an additional hearing was not necessary to examine the documents. The documents were admitted into the record on April 6, 1999 and the record in this appeal was closed on that date.

## SUMMARY

In this Decision, I conclude that Mr. Mittenen does not have sufficient evidence of a lease of the F/V ESKIMO PRINCESS. I also conclude that the halibut landings recorded under Mr. Cossette's Commercial Fisheries Entry Commission (CFEC) permit on state fish tickets for May 4 and June 2, 1986, are not legal landings for purposes of QS. Therefore, I conclude that Mr. Cossette, as the vessel's owner, is entitled to the QS associated with the halibut landings made from the F/V ESKIMO PRINCESS in 1986, minus the landings recorded under his CFEC permit on state fish tickets for May 4 and June 2, 1986.

## ISSUES

1. Did Mr. Mittenen lease the F/V ESKIMO PRINCESS from Mr. LeRoy Cossette in 1986?
2. Do the halibut landings of May 4 and June 2, 1986, which were recorded under Mr. Cossette's CFEC permit on state fish tickets, qualify as legal landings for purposes of QS?

## BACKGROUND

In a separate appeal by Mr. Mittenen, we decided that he is a qualified person for halibut QS.<sup>4</sup> In this appeal, Mr. Mittenen seeks IFQ credit for additional qualifying pounds of halibut, based on his alleged oral lease of Mr. Cossette's vessel, the F/V ESKIMO PRINCESS, during the 1986 halibut season.

RAM's official record shows that halibut landings were made from the F/V ESKIMO PRINCESS in 1986 on May 4, June 2, July 11, and August 31. Approximately one-third of the halibut landed on May 4 and June 2 were recorded under Mr. Cossette's CFEC permit on state fish tickets. The rest of the halibut from relevant landings were all recorded under Mr. Mittenen's CFEC permit. At the March 1999 hearing, Mr. Cossette admitted that he was never aboard the vessel F/V ESKIMO PRINCESS during the 1986 season while the halibut were being harvested.

The parties entered into an oral agreement for Mr. Mittenen's operation of the F/V ESKIMO PRINCESS in 1986 and they do not dispute its basic terms. Under the arrangement, gross revenues from the vessel were split, **a** for Mr. Cossette and **b** for Mr. Mittenen. Mr. Cossette was responsible for insurance, vessel repairs and maintenance, and halibut gear. Mr. Mittenen was responsible for trip expenses (fuel, bait, food, ice), crew shares, and replacement gear.

The parties stipulated that, during the 1986 Alaska halibut season, Mr. Mittenen directed the fishing and marketing operations of the F/V ESKIMO PRINCESS; had the right to hire, fire, and pay the crew; and did not receive any written or oral direction from Mr. Cossette with regard to the treatment of Mr. Mittenen's fishing expenses for federal income tax purposes.

Mr. Mittenen submitted the following evidence in support of his claim that he leased the vessel from Mr. Cossette:

- Mr. Mittenen's affidavit, December 30, 1997;
- the affidavits of Brian Mittenen, September 23, 1997; John Wilcomb, November 7, 1997; Bernard Gallaher, November 25, 1997; and John Cromwell, December 3, 1997;
- Mr. Mittenen's monthly bank statements (May, June, July, and August, 1986) at First

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<sup>4</sup>See, Thomas W. Mittenen, Appeal No. 96-0002, January 22, 1999.

Federal Savings, Kodiak;

- receipts confirming four checks written on Mr. Mittenen's checking account at First Federal Savings, Kodiak, for groceries and crew shares relating to salmon tendering;
- a complaint for crew wages filed by Mr. Paul Linden against Mr. Mittenen in the Seattle District Court at King County, Washington;
- a letter from Stephen Acheson, First National Bank of Anchorage, February 20, 1998, stating that the bank no longer has records of checks or deposits posted to Mr. Mittenen's account at First Federal Savings (Kodiak) between 5/14/86 - 9/5/86;
- a list of labor supplied for the F/V ESKIMO PRINCESS in 1986 by Mr. Mittenen and his son, David Mittenen;
- a letter of November 4, 1986, from Mr. Mittenen to Mr. Cossette for payment of \$282 relating to out-of-pocket expenses paid by Mr. Mittenen to ready the F/V ESKIMO PRINCESS; and
- letters and documents (December 5, 1986 and January 14, 1987) written by Mr. Cossette's lawyer at the time, Mr. Harold Thoreen, which refers to Mr. Mittenen's "charter," "charter hire," and "oral charter agreement" of the F/V ESKIMO PRINCESS in 1986.

Although ordered to do so,<sup>5</sup> Mr. Mittenen did not produce his federal income tax return for 1986.

Mr. Cossette produced the following evidence to prove that he did not lease the vessel to Mr. Mittenen in 1986:

- Mr. Cossette's declaration, May 11, 1998;
- a letter, May 11, 1998, from Mr. John Long, insurance broker for Griffin MacLean, Inc., stating that the company only issued policy coverage to Mr. Cossette for the F/V ESKIMO PRINCESS in 1986;
- Mr. Cossette's check register for checks written on his account in 1986 at The First National Bank of Anchorage, Kodiak;

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<sup>5</sup>See, the Order to Produce Evidence, November 6, 1997.

- Mr. Cossette's settlement sheet for the F/V ESKIMO PRINCESS at Ursin Seafoods, Inc., between 7/15/86 - 9/12/86;
- Mr. Cossette's record of his transactions for the F/V ESKIMO PRINCESS at Ursin Seafoods, Inc., between 5/16/86 - 7/25/86;
- Mr. Cossette's bank checks, deposit slips, and deposit statements relating to the F/V ESKIMO PRINCESS in 1986 at The First National Bank of Anchorage, Kodiak;
- invoices, each signed either by Mr. Cossette or Mr. Mittenen, for purchases of engine parts, supplies, and fishing gear on the account of Mr. Cossette and the F/V ESKIMO PRINCESS at various businesses in 1986;
- Schedule C of Mr. Cossette's federal tax return for 1986;
- a copy of Mr. Chuck Davis' letter to Mr. Thoreen, February 6, 1987, which includes a settlement statement from Arctic Choice, Inc., for the salmon tendering by Mr. Mittenen in 1986;
- Mr. Bernard Gallaher's declaration, April 28, 1998, stating that he did not know the terms of the arrangement between Mr. Mittenen and Mr. Cossette for the running of the F/V ESKIMO PRINCESS in 1986.

## DISCUSSION

### **I. Did Mr. Mittenen lease the F/V ESKIMO PRINCESS from Mr. LeRoy Cossette in 1986?**

To qualify for QS under the regulations of the IFQ program, a person must have owned or leased a vessel that made legal landings of halibut or sablefish in a QS qualifying year (1988, 1989, or 1990).<sup>6</sup> A qualified person's halibut QS is based on the best five years of legal landings of halibut made from vessels owned or leased by that person during the period 1984-1990.<sup>7</sup> Mr. Mittenen claims that he leased Mr. Cossette's vessel, the F/V ESKIMO PRINCESS, under an oral agreement that was in effect from April to October 1986, and that he should receive IFQ credit for all the halibut landings made from the vessel during that time.

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<sup>6</sup>See, 50 C.F.R. § 679.40(a)(2).

<sup>7</sup>See, 50 C.F.R. § 679.40(a)(4)(I).

Neither the IFQ regulations nor the regulatory history define “vessel lease.” In a series of decisions,<sup>8</sup> this Office identified seven factors to assist Appeals Officers in deciding whether a valid oral vessel lease existed. The factors are:

- (1) how the parties characterized their business arrangement at the relevant times;
- (2) whether and to what extent the claimed lessee had possession and command of the vessel and control of the navigation of the vessel;
- (3) whether the claimed lessee directed the fishing operations of the vessel;
- (4) whether the claimed lessee had the right to hire, fire, and pay the crew of the vessel;
- (5) whether the claimed lessee was responsible for the operating expenses of the vessel;
- (6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her business for federal income tax and other purposes; and
- (7) whether the claimed lease had a set or guaranteed term.

We developed these factors after reviewing the regulatory history of the IFQ program, maritime law, and other legal principles relating to leases. We discovered that the North Pacific Fishery Management Council intended to award QS to vessel lessees because, like vessel owners, lessees "supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations."<sup>9</sup> In our first decision involving a vessel lease issue,<sup>10</sup> we said:

it appears that the Council intended to allocate Quota Share to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.<sup>11</sup> This is the kind of

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<sup>8</sup>*See, e.g., O'Rourke v. Riddle*, Appeal No. 95-0018, May 18, 1995; *F/V Determined Partnership v. Big Blue, Inc.*, Appeal No. 95-0049, October 22, 1996; *Smee v. Echo Belle, Inc.*, Appeal No. 95-0076, August 1, 1996; *Kristovich v. Dell*, Appeal No. 95-0010, March 20, 1996.

<sup>9</sup>58 Fed. Reg. 59,375, at 59,378 (November 9, 1993).

<sup>10</sup>*O'Rourke v. Riddle*, Appeal No. 95-0018, at 13, May 18, 1995, *aff'd* May 23, 1996.

<sup>11</sup>WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988)

person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

The factors were designed to help identify which party, as between a vessel owner and a claimed vessel lessee, was the "true" fishing entrepreneur. Owners and operators of fishing vessels enter into a variety of business arrangements, with varying degrees of formality. In many ways, owners and operators share in the risks, responsibilities, and rewards of a commercial fishing enterprise. For example, whether an owner leases his vessel to another or not, the owner typically is compensated with a share of the fishing proceeds and, therefore, always has a stake in the success of the enterprise. Whether the operator leases the vessel or works as a hired skipper, partner, or joint venturer of the owner, the operator accepts personal and financial risks by taking the vessel and crew out to sea, and by relying on their catch for a livelihood. And because hired skippers and crew almost always work as independent contractors, rather than as employees, everyone involved in a commercial fishing enterprise could be considered, in a sense, an entrepreneur.

Nonetheless, the Council chose to award Quota Shares only to qualified vessel owners or vessel lessees. The Council preferred to reward vessel owners and those who (as lessees) acted like vessel owners, rather than those who worked with, for, or as agents of, vessel owners. A non-owner vessel operator must have had a lease to qualify for an initial issuance of QS; any other relationship results in the QS going to the vessel owner. Therefore, to find for a claimed lessee, the Appeals Officer must reach a legal conclusion that the parties entered into a legally valid vessel lease that was in effect when the qualifying landings in question were made.

Unlike our analysis of purported written vessel leases, which focuses almost exclusively on the four corners of the document, our analysis of oral vessel leases considers the parties' words, conduct, and documents. Regardless of whether the parties' agreement was written or oral, we must answer the same questions: (1) What were the terms of the agreement? (2) Did the agreement constitute a legally valid vessel lease? and (3) If so, when was it in effect?

In applying the oral lease factors, we have found it necessary to use a flexible case-by-case analysis. The factors are analytical tools or guideposts, rather than elements of a vessel lease. The factors are not exclusive; an Appeals Officer has discretion to consider additional factors in particular cases if they help in determining whether a lease existed between the parties.

I shall now discuss whether Mr. Mittenen leased the ESKIMO PRINCESS from Mr. Cossette during 1986.

## **1. The Parties' Characterization of their Business Arrangement at relevant times.**

This factor relates to discussions between the parties during relevant times (and documents that would shed light on the discussions). Relevant evidence is the oral testimony of the parties, as to what the parties said to one another at relevant times; statements or documents of intermediaries or agents, who helped or assisted in the parties' negotiations or agreement; and statements or documents showing what the parties said to other people about the parties' discussions, supported by credible circumstantial evidence.

Mr. Mittenen testified that he contacted Mr. Bernard Gallaher of Alaska Permit Sales in early 1986 about "leasing" the F/V ESKIMO PRINCESS, and that Mr. Gallaher knew the terms of the parties' arrangement and "brokered the deal." [Tape 1, side a; Tape 4, side a; Mr. Mittenen's affidavit, p.1] Mr. Gallaher affirmed in an affidavit that he brokered the "lease" between the parties, and that he knew the "lease terms." [Mr. Gallaher's affidavit, November 25, 1997, p.1] Mr. Gallaher's affidavit was drafted by Mr. Mittenen's attorney.

Mr. Mittenen testified that he and Mr. Cossette did not agree face-to-face to the lease of the vessel, but that the lease was arranged by Mr. Gallaher, who met with Mr. Cossette, and that Mr. Mittenen later agreed to the lease arrangement after it was told to him by Mr. Gallaher. [Tape 4, side a].

Mr. Cossette testified that he talked to Mr. Gallaher in early April 1986, but that they did not discuss any terms or contracts. [Tape 4, side a] He said that Mr. Gallaher told him only that Mr. Mittenen was interested in a vessel for longlining. [Tape 4, side a] Mr. Cossette testified that Mr. Gallaher convinced him that Mr. Mittenen could make more money than he (Mr. Cossette) with the F/V ESKIMO PRINCESS. [Tape 4, side a] Mr. Cossette testified that "Mr. Gallaher simply introduced Mittenen to me." [Mr. Cossette's declaration, p.2] In another affidavit, Mr. Gallaher affirms that he did not know the terms of the agreement between the parties, and that he never spoke to Mr. Cossette about the terms of the parties agreement. [Mr. Gallaher's declaration, April 28, 1998, p.2] Mr. Mittenen attempted to get Mr. Gallaher to testify at the hearing, but Mr. Gallaher was unwilling to do so. [Tape 4, side a]

Mr. Cossette testified that he and Mr. Mittenen met in Kodiak in mid-April 1986, and agreed that Mr. Mittenen would "run" the F/V ESKIMO PRINCESS for the halibut season of 1986. [Tape 4, side b] Mr. Mittenen acknowledges that he and Mr. Cossette met face-to-face in mid-April, but contends that the lease was brokered by Mr. Gallaher. [Tape 2, side b; Tape 4, side a].

Mr. Mittenen testified that he called John Long, the insurance broker for Mr. Cossette and the F/V ESKIMO PRINCESS, twice in April 1986 (before the May halibut opener). Mr. Mittenen told Mr. Long that he [Mr. Mittenen] was "leasing" the boat." [Tape 2, side b]. Mr. Long testified that he did not recall these conversations [Tape 7, side a], and that under the terms of the insurance policy, Mr. Mittenen was named only as an "operator," not a bareboat charterer, of the vessel. [Tape 6, side b].

Mr. Cossette's insurance policy prohibited the bareboat charter of the F/V ESKIMO PRINCESS, absent written approval of insurers. [See, "change of ownership" provision in the insurance policy].

Mr. Cossette said he does not recall whether he referred to Mr. Mittenen as his "employee." [Tape 6, side a] He characterized his arrangement with Mr. Mittenen as the person who was "running the boat." [Tape 6, side a]

According to Mr. Cossette, the parties agreed that the vessel would be operated like a "halibut boat owners-[hired skipper] union agreement." [Tape 4, side b] Mr. Mittenen testified that he would not have signed a union agreement because it would have caused him to lose money. [Tape 7, side b]

In an affidavit, Brian Mittenen (Appellant's son) states that he saw a written lease between the parties for the F/V ESKIMO PRINCESS, which was arranged by Mr. Gallaher. I do not believe that Brian saw a "written lease" because both parties deny that one ever existed.

In three separate documents arising out of litigation between the parties in late 1986 and early 1987, Mr. Cossette's lawyer, Harold Thoreen, referred to the parties' arrangement as a "charter," an "oral charter," and a "charter hire." The documents were written in regard to a claim by Mr. Cossette for a greater share of the vessel's salmon tendering proceeds. In response to Mr. Thoreen, Chuck Davis (Mr. Mittenen's lawyer) replied that he would seek a "wage lien" against the F/V ESKIMO PRINCESS for the labor supplied to the vessel by Mr. Mittenen and his son (David Mittenen). Mr. Cossette testified that he did not tell his lawyer that he had a "lease" arrangement with Mr. Mittenen. [Tape 6, side a].

Mr. Mittenen testified that under the agreement arranged by Mr. Gallaher, Mr. Mittenen would "lease" the boat, pay Mr. Cossette one-third of the "gross proceeds," and be responsible for replacing worn-out fishing gear, and the "crew, bait, and fuel," for the "total halibut season of 1986." [Tape 1, side b]. Mr. Cossette would be responsible for "catch-up maintenance" and for "value-added" improvements to the vessel. [Tape 1, side b; Tape 2, side a] Mr. Mittenen testified that he was only responsible for repairs and maintenance related to the "normal wear and tear" of the vessel [Tape 2, side a], and that he would provide the labor, and that Mr. Cossette would supply the materials, to ready the vessel for the halibut season. [Tape 2, side a]. Mr. Mittenen also testified that Mr. Cossette would provide hull and P&I insurance [Tape 2, side b], and that he (Mr. Mittenen) could not use the vessel's name to finance the vessel's trip expenses. [Tape 3, side b].

Mr. Cossette testified that the parties agreed that Mr. Cossette would receive one-third of the vessel's gross, provide halibut gear, and pay for insurance, maintenance, and "whatever else." Mr. Mittenen would receive the remaining gross, and be responsible for the crew, fuel, ice, bait, lube oil, grease, lost gear, and gear replacement. [Tape 4, side b; Tape 5, side a, Tape 5, side b, Tape 7, side b] Mr. Cossette also testified that both parties agreed that Mr. Cossette would sign fish tickets for his portion

of the landings. [Tape 7, side a]

While the evidence shows that the parties had an agreement and discussed the terms for the use of the F/V ESKIMO PRINCESS, the weight of the evidence does not show that they characterized their business arrangement as a lease at relevant times. The evidence does not show that the parties discussed the lease of the vessel face-to-face, that a vessel lease was brokered by a third party, or that anyone witnessed the parties discuss a vessel lease arrangement. Mr. Mittenen did not testify that he and Mr. Cossette discussed a vessel lease when they met face to face; Mr. Mittenen's broker, Mr. Gallaher, stated in a signed affidavit that he did not broker a lease between the parties, and he was unwilling to testify at the hearing to say that he did so. Mr. Mittenen's son, Brian, stated in a signed affidavit that he saw a written lease between the parties, but the parties acknowledge that a written lease never existed. Mr. Mittenen testified that he once told Mr. Long that he had leased the vessel from Mr. Cossette, but Mr Long could not recall that Mr. Mittenen had done so when he testified the hearing. In fact, the insurance policy prohibited the bareboat charter of the vessel. Finally, the documents arising out of litigation between the parties at best show only that the parties had a wage claim or salmon tendering dispute.

I find by a preponderance of the evidence that the parties did not characterize their business arrangement as a lease at relevant times.

**2. Whether and to what extent Mr. Mittenen had possession and command of the vessel and control of the navigation of the vessel.**

The parties do not dispute that Mr. Mittenen had possession and command of the F/V ESKIMO PRINCESS during the period in question, and that he was in control of the navigation of the vessel. Nor is there evidence in the record to show otherwise. Mr. Cossette signed state fish tickets for one-third of the halibut landings made from the vessel in May and June of the relevant period. He admits, however, that he was not aboard the vessel at any time during the relevant halibut fishing in 1986. I find that Mr. Mittenen was in possession and command, and in control of the navigation, of the F/V ESKIMO PRINCESS during the relevant period.

**3. Whether Mr. Mittenen directed the fishing operations of the vessel.**

It is undisputed that Mr. Mittenen directed the fishing operations of the F/V ESKIMO PRINCESS. The evidence in the record does not show otherwise. I find that Mr. Mittenen directed the fishing operations of the vessel during the relevant period.

**4. Whether Mr. Mittenen had the right to hire, fire, and pay the crew of the vessel.**

As in factors 2 and 3, the parties stipulated that Mr. Mittenen had the right to hire, fire, and pay the

crew of the F/V ESKIMO PRINCESS. The evidence in the record does not show otherwise. I find that Mr. Mittenen had the right to hire, fire, and pay the crew of the vessel during the relevant period.

## **5. Whether Mr. Mittenen was responsible for the operating expenses of the vessel.**

The “operating expenses of the vessel” are those expenses that are attributable to the fishing operations in question. These would include trip expenses, as well as other expenses necessitated by the fishing operations.<sup>12</sup>

A party’s investment in the fishing enterprise is certainly significant in determining whether the party was the type of person the North Pacific Fishery Management Council believed would qualify as a lessee. In Alliance Against IFQs v. Brown,<sup>13</sup> the U.S. Court of Appeals for the Ninth Circuit noted that the Council grouped owners and lessees of boats as being those participants in the industry who had a “capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid from a fishing trip.” *Id.* (quoting 58 Fed. Reg. 375, at 59,386 (Nov. 9, 1993)).

The Council apparently concluded that vessel lessees, like vessel owners, take some financial risk and have some control over the level of capitalization of the fisheries. That, the Council indicated, is what distinguishes vessel owners and lessees as a group from hired skippers and other crew members. Yet, the Council did not require that a person must have made a certain level of investment to be considered a lessee under the IFQ program. When there is a written lease, for example, a lessee need not show any capital investment. Only a valid, executed lease document identifying the leased vessel, the lease holder and the period of time during which the lease was in effect must be produced.<sup>14</sup>

As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements, and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the payments and handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show

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<sup>12</sup>See, Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, *aff’d* August 20, 1996, *aff’d* Smee v. N.M.F.S., C96-1512WD (W.D. Wash., June 9, 1997).

<sup>13</sup>84 F.3d 343 (9th Cir. 1996).

<sup>14</sup>50 C.F.R. § 679.40(a).

there was a lease.

#### **A. Mr. Mittenen's expenses**

It is undisputed that Mr. Mittenen was responsible for payment of fuel,<sup>15</sup> bait, food, crew share, and replacement gear during the vessel's operations for the relevant period. Mr. John Wilcomb, the plant manager of Ursin Seafoods, Inc., in 1986, testified the parties told him that Mr. Cossette would not be responsible for any trip expense charges (fuel, bait, groceries, or ice) made by Mr. Mittenen for the operation of the F/V ESKIMO PRINCESS. [Tape 5, side b]. Other than a \$179.46 advancement to ready the vessel, it is unclear from the record as to what extent, if any, Mr. Mittenen personally paid, or was at risk, for any trip expenses that were incurred prior to the vessel's operations. Nor is there is any evidence that Mr. Mittenen paid for any replacement gear. Mr. Mittenen claims that he advanced funds for crew airfare and foul weather gear, but he has no receipts to prove that he did. Mr. Mittenen's capital investment in the vessel was non-existent, and his financial risk in the vessel's operations was at best marginal.

#### **B. Mr. Cossette's expenses**

##### **Repairs, maintenance, refurbishment of the vessel**

Mr. Cossette's checks, settlement statement at Ursin's Seafoods, Inc., and check register show that Mr. Cossette was at risk and paid for expenses relating to the repair, maintenance, and refurbishment of the F/V ESKIMO PRINCESS during the relevant period.

Mr. Mittenen's only proof that he paid any vessel repair and maintenance expenses is a letter that he wrote to Mr. Cossette, November 4, 1986, which itemizes bills "paid personally" by Mr. Mittenen. Mr. Mittenen has no receipts for the bills. The expenses, if incurred, were minimal [\$179.46], and were deducted from Mr. Cossette's share of salmon tendering proceeds during August 1986. [See the enclosures attached to the November 4, 1986 letter].

##### **Halibut gear**

Mr. Cossette's checks and check register show that he paid for the halibut gear of the vessel during the relevant period. While it is undisputed that Mr. Mittenen was required under the agreement to replace the used or worn fishing gear of the vessel, he has no receipts to show that he did so.

##### **Insurance**

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<sup>15</sup>Mr. Cossette in fact paid for the first fueling of the vessel for the 1986 halibut fishing season.

It is undisputed that Mr. Cossette paid for the insurance (hull and P&I) of the vessel. The sums for the insurance payments were quite substantial [\$15,000, plus].

### **Other expenses**

Mr. Cossette's checks and check register show that Mr. Cossette paid for moorage, for damages to a dock ladder at Ursin Seafoods, Inc., and for the first fueling of the vessel, during the relevant period.

### **C. Conclusion of factor 5 — responsibilities for operating expenses**

Both Mr. Mittenen and Mr. Cossette agreed to assume financial responsibility for the operating expenses of the F/V ESKIMO PRINCESS during the relevant period. Mr. Mittenen paid trip expenses and crew shares, while Mr. Cossette paid vessel repair and maintenance, insurance, halibut gear, and miscellaneous expenses.

Mr. Mittenen obligated himself only to trip expenses and gear replacement, which would have been shared with his other crew members. He was not obligated to pay for engine repairs, vessel modifications, navigation upgrades (radar), or to provide halibut gear for the venture. Mr. Cossette assumed those responsibilities. Nor was Mr. Mittenen willing to assume the liability risks for the venture. Mr. Cossette, not Mr. Mittenen, provided the insurance, and paid for the damages to Ursin Seafoods, Inc., ladder. Mr. Cossette also paid for the vessel's moorage and the vessel's first fueling. Mr. Mittenen's financial risks of the venture were minimal. While both parties assumed financial responsibility for the operating expenses of the vessel, the risks assumed by Mr. Mittenen were no greater than trip expenses, which were shared with the crew.

The allocation and assumption of financial responsibilities and liabilities between the parties shows Mr. Mittenen more like a crew member, hired skipper, or partner, rather than a vessel lessee.

### **6. Whether Mr. Mittenen treated the fishing operations in which the vessel was used as his own business for federal income tax and other purposes.**

The fundamental inquiry in this case is whether the operation of the F/V ESKIMO PRINCESS during the relevant period was, in essence, Mr. Mittenen's operation, in which he leased the vessel from Mr. Cossette.

### **Accounting and record keeping**

Mr. Mittenen did not produce bank checks or settlement statements in the name of the F/V ESKIMO PRINCESS. He produced bank statements from First Federal Savings in Kodiak, Alaska, but the account was only in Mr. Mittenen's name as an individual. Mr. Mittenen claimed that he also had a

bank account in Seattle, Washington, but he was unable to produce any record of the account.

Mr. Cossette's bank checks and check register show that Mr. Cossette had his own checking account at The First National Bank of Anchorage, Kodiak, in the name of the F/V ESKIMO PRINCESS. The settlement statement from Ursin Seafoods, Inc. also shows that Mr. Cossette had an account at Ursin Seafoods, Inc., in the name of the F/V ESKIMO PRINCESS.

The parties testified that they instructed Ursin Seafoods, Inc. to pay Mr. Cossette one-third, and to pay Mr. Mittenen two-thirds, of the vessel's gross proceeds of each halibut fishing trip. [Tape 3, side b; Tape 5, side a] The record is absent of evidence that Ursin Seafoods, Inc. paid Mr. Mittenen any of the proceeds from the vessel's operations. The settlement statement from Ursin Seafoods, Inc. shows that it paid Mr. Cossette his one-third share after deductions for purchases of repairs and maintenance relating to the F/V ESKIMO PRINCESS during the relevant period. On one occasion, Ursin Seafoods, Inc. paid Mr. Mittenen his two-thirds share out of the proceeds in Mr. Cossette's account.

Mr. Mittenen did not produce his own settlement statements. It is likely, however, that Mr. Mittenen had his own account at Ursin's because Mr. Cossette's settlement statement does not include any trip expenses for the operation of the vessel. Thus, it is likely that both parties had separate accounts at Ursin Seafoods, Inc.

Mr. Cossette's invoices show that both parties charged repair and maintenance expenses relating to the F/V ESKIMO PRINCESS on Mr. Cossette's accounts at various businesses in Kodiak, Alaska.

At best, the accounts and records produced by Mr. Cossette shows that both parties treated the operations of the F/V ESKIMO PRINCESS as their separate business. One-third of the operation of the vessel was Mr. Cossette's business; and two-thirds of the operation of the vessel was Mr. Mittenen's business. Mr. Mittenen did not treat the entire operation of the vessel as his business during the relevant period for record keeping and accounting purposes.

## **Taxes**

Mr. Mittenen did not produce a federal tax return for 1986. He was unable to specifically recall how he claimed the income and expenses of the vessel for that tax year. Absent the tax return itself, I am unable to determine how Mr. Mittenen claimed or characterized the vessel's operation for tax purposes. Mr. Cossette produced a copy of his federal income tax return for 1986, but the return is not helpful as to how Mr. Mittenen treated the operation of the F/V ESKIMO PRINCESS for tax purposes.

## **Liability**

Mr. Cossette purchased both hull and P&I insurance for the F/V ESKIMO PRINCESS. Mr. Mittenen did not purchase insurance covering the operations of the vessel during the relevant period, nor did he reimburse Mr. Cossette for the insurance payments. The insurance policy for the vessel does not indicate the existence of a lease. In fact, the policy specifically prohibits the bareboat charter of the vessel. Mr. Cossette is the person covered under the insurance policy for the operations of the vessel. Mr. Mittenen is named only as a person permitted to be aboard the vessel during the vessel's operations. [See, the "owner operated warranty," clause 11, of the insurance policy for the F/V ESKIMO PRINCESS].

Mr. Cossette's assumption of the liability associated with the vessel is inconsistent with Mr. Mittenen's claim that he leased the vessel.

### **Vessel Repair and Refurbishment**

The evidence in the record shows that prior to the first halibut run, and that in between halibut runs, Mr. Mittenen and crew provided the labor, and Mr. Cossette provided the capital, to ready the F/V ESKIMO PRINCESS for halibut fishing. While Mr. Mittenen purchased the materials to repair and refurbish the vessel, the purchases were made on Mr. Cossette's credit. The labor provided by Mr. Mittenen, and the money paid by Mr. Cossette, to ready the vessel, were consistent with the parties agreement. It is also common for hired skippers and crew to spend time working on vessels when the vessel is not fishing. [See Smee, at 22].

The arrangement between the parties for vessel repair and refurbishment is more indicative of a partnership or a joint venture, than a lease, between the parties. Vessel repair and refurbishment were not solely Mr. Mittenen's responsibility. The responsibilities were jointly shared between the parties.

### **Conclusion of factor 6 — treatment as own business**

In sum, the weight of the evidence does not show that Mr. Mittenen treated the operation of the F/V ESKIMO PRINCESS as *his own* business. He did not pay for any vessel repairs or refurbishment or for any insurance related to the vessel's operation. Nor is there proof that Mr. Mittenen paid any taxes, or listed any tax deductions related to the vessel's operation as a lessee, or that he controlled the disbursements of the proceeds resulting from the vessel's operation. There is no proof that Mr. Mittenen ever paid Mr. Cossette or that he was ever paid the entire proceeds of the vessel's operations. Mr. Mittenen's bank account at First Federal Savings, Kodiak, is solely in his name as an individual and was not set up as a business account for the F/V ESKIMO PRINCESS.

At best, the operation of the vessel was a shared enterprise. Both parties had separate accounts for vessel purchases at Ursin Seafoods, Inc.; both were paid off the top by Ursin Seafoods, Inc. pursuant to instructions given by the parties; both used Mr. Cossette's accounts at various businesses for vessel

repairs; and both shared in readying the vessel for halibut fishing, with Mr. Mittenen providing the labor, and Mr. Cossette providing the capital.

I cannot find that Mr. Mittenen treated the fishing operations of the F/V ESKIMO PRINCESS as his own business during the relevant period.

## **7. Whether the claimed lease had a set or guaranteed term.**

The absence of a set or guaranteed term is not fatal per se to the existence of a vessel lease for purposes of QS. Nevertheless, the existence of a set or guaranteed term can be a useful indicator of the existence of a vessel lease.

Mr. Mittenen testified that the parties agreed that the term of their arrangement would be for the duration of “the 1986 halibut season.” [Tape 3, side b] Mr. Cossette testified the term of their arrangement was for the “summer” of 1986. [Tape 4, side b] Mr. Mittenen returned the vessel in early September, before the end of the halibut season. The evidence does not show that Mr. Cossette objected to the vessel’s early return. I find that the weight of evidence shows the parties’ arrangement was based on a set or guaranteed term.

## **Summary of issue I evidence**

The arrangement between the parties is more typical of a hired skipper arrangement, partnership, or joint venture, than a vessel lease.

Mr. Mittenen did many things that one would expect a “lessee” to do. He was in possession and in command of the operation of the vessel, including the vessel’s navigation for a set term. He had the right to hire, fire, and pay the crew. He directed the fishing activities of the vessel, including the marketing of the fish. He paid and was at risk for the vessel’s trip expenses. He decided the repairs needed for the vessel. He provided the labor needed to ready the vessel for halibut fishing; and he was required to replace and pay for worn out or lost fishing gear. The owner, Mr. Cossette, was not aboard the vessel during the relevant halibut fishing in 1986, when the gear was operated to catch the fish. These activities and responsibilities, however, are not inconsistent with those under an owner-hired skipper arrangement.

On the other hand, Mr. Mittenen did not do things that one would normally expect a lessee to do. He did not provide any insurance for the vessel. He did not pay for repairs or maintenance of the vessel. Nor did he supply his own halibut gear. Mr. Mittenen made no capital contributions to the venture. His only financial risk were his trip expenses, which he shared with his crew. He did not control the disbursements of the enterprise, nor did he pay Mr. Cossette. Mr. Mittenen was unable to supply any writing of a “lease” arrangement between the parties. Nor is there a settlement statement, tax return,

insurance policy, check, or other business record evidencing the existence of lease payments. To the contrary, the insurance policy for Mr. Cossette specifically prohibited the bareboat charter of the F/V ESKIMO PRINCESS during the relevant period. Finally, Mr. Mittenen failed to provide evidence that he treated the operation of the vessel as his business during the relevant period. The only settlement statement in the record for the F/V ESKIMO PRINCESS is in Mr. Cossette's name; and Mr. Mittenen's bank statements for the relevant period are only in his name as an individual.

Both parties assumed financial risk, shared in the distribution of profits, and readied the vessel for the commercial fishing of halibut. In this regard, the parties acted more like partners in a joint venture, than as an owner and a lessee.

I conclude that Mr. Mittenen did not lease the F/V ESKIMO PRINCESS from Mr. Cossette during the period in question.

## **II. Do the halibut landings of May 4 and June 2, 1986 that were recorded under Mr. Cossette's CFEC permit on state fish tickets qualify as legal landings for purposes of QS?**

To be considered a "legal landing" under the regulations of the IFQ program, the halibut or sablefish must have been harvested with fixed gear and landed in compliance with the state and federal regulations in effect at the time of the landing.<sup>16</sup> Evidence of a legal landing is documentation of state fish tickets or federal catch reports that indicate the amount of halibut or sablefish harvested, the IPHC regulatory area or groundfish reporting area in which it was caught, the vessel and gear type used to catch it, and the date of harvesting, landing, or reporting.<sup>17</sup>

Under the state of Alaska regulations in 1986, persons or companies that caught and processed fish were required to submit fish tickets to the state<sup>18</sup> for the fish.<sup>19</sup> The full name and signature of the permit holder was required to be recorded on the state fish tickets.<sup>20</sup> The person who signed a state fish ticket as the permit holder must have operated the fishing gear at the time the fish were harvested.<sup>21</sup> The regulations provided in relevant part:

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<sup>16</sup>See, 50 C.F.R. § 679.40(a)(3).

<sup>17</sup>See, 50 C.F.R. § 679.40(a)(3)(v)(B).

<sup>18</sup>The Alaska Department of Fish and Game.

<sup>19</sup>See, 05 AAC 039.130(b).

<sup>20</sup>See, 05 AAC 039.130(b)(2).

<sup>21</sup>See, 05 AAC 039.130(b)(9).

© Each buyer of raw fish, each fisherman selling to a buyer not licensed to process fish (a catcher/seller), and each person or company who catches and processes his or her own catch or has that catch processed by another person or company, shall record each landing on an ADF&G fish ticket. ... The record must include the following: ...

(2) the full name and signature of the permit holder; ...

(9) the CFEC<sup>22</sup> permit number of the operator of unit of gear with which the fish were taken, imprinted on the fish ticket from the valid permit card at the time of delivery.

RAM's official record shows that approximately one-third of the halibut landed from the F/V ESKIMO PRINCESS on May 4 and June 2, 1986, was recorded on state fish tickets under Mr. Cossette's CFEC permit. Mr. Cossette and Mr. Mittenen testified that Mr. Cossette was not aboard the vessel at the time of the harvest of the above described halibut. [Tape 1, side b; Tape 7, side a] Mr. Cossette acknowledged that he signed the May 4 and June 2 fish tickets, even though he was not the operator of the gear at the time of the harvest of the fish. [Tape 7, side a] Consequently, I conclude that Mr. Cossette's state fish tickets of May 4 and June 2, 1986, were not signed in compliance with state regulations. I conclude that the pounds recorded under Mr. Cossette's CFEC permit on state fish tickets do not qualify as legal landings for purposes of QS.

#### FINDINGS OF FACT

1. Mr. Mittenen mistakenly claimed on his timely RFA that he leased the F/V ESKIMO PRINCESS from Mr. Cossette in 1966.
2. The parties did not characterize their business arrangement as a lease during the relevant period.
3. During the relevant period, Mr. Mittenen possessed and commanded the F/V ESKIMO PRINCESS, controlled of the navigation of the vessel, directed the vessel's fishing and marketing activities, and hired, fired, and paid the crew of the vessel.
4. Both parties assumed financial responsibility for the operating expenses of the vessel, but the risks assumed by Mr. Mittenen were no greater than trip expenses, which were shared with the crew.
5. Mr. Mittenen did not make capital investments in the operations of the F/V ESKIMO PRINCESS, nor did he assume liability responsibilities, with regard to the vessel's operations during the relevant period.

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<sup>22</sup>State of Alaska Commercial Fisheries Entry Commission.

6. Mr. Mittenen did not treat the operation of the F/V ESKIMO PRINCESS as his own business for purposes of taxes, insurance, the receipt and disbursement of Mr. Cossette's proceeds, and vessel repair and refurbishment.
7. The parties agreed to a set or guaranteed term for the use of the F/V ESKIMO PRINCESS during the relevant period.
8. Approximately one-third of the halibut landings from the F/V ESKIMO PRINCESS on May 4 and June 2, 1986 were recorded under Mr. Cossette's CFEC permit on state fish tickets.
9. Mr. Cossette was not aboard the F/V ESKIMO PRINCESS at the time of harvest of the halibut from the vessel in 1986.
10. Mr. Cossette claimed landings of halibut under his CFEC permit on state fish tickets dated May 4 and June 2, 1986, even though he was not the operator of the gear at the time of the harvest of the fish.

#### CONCLUSIONS OF LAW

1. Mr. Mittenen did not lease the F/V ESKIMO PRINCESS from Mr. Cossette in 1986.
2. Mr. Cossette's state fish tickets of May 4 and June 2, 1986, for halibut landings under his CFEC permit, were not prepared and signed in compliance with state of Alaska regulations.
3. The May 4 and June 2, 1986, halibut landings recorded on Mr. Cossette's state fish tickets do not qualify as legal landings for purposes of QS.

#### DISPOSITION AND ORDER

The portion of the IAD that denied Mr. Mittenen's claim that he leased the F/V ESKIMO PRINCESS from Mr. Cossette in 1986 is **AFFIRMED**. RAM is **ORDERED** to reallocate to Mr. Cossette the qualifying pounds of halibut landed from the vessel in 1986, minus the qualifying pounds of halibut recorded on Mr. Cossette's CFEC permit on May 4 and June 2, 1986; and to issue to Mr. Cossette the resultant QS. This Decision takes effect on April 21, 2000, unless by that date the Regional Administrator orders review of the Decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m., Alaska Time, on April 3, 2000. The tenth day after the date of this Decision is Saturday, April 1st. April 3rd is the first business day following. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement

or points and authorities in support of the motion.

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Randall J. Moen  
Appeals Officer